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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL JACKSON, Defendant and Appellant.	A151120 (Solano County Super. Ct. No. VCR221796)

A jury convicted defendant Michael Jackson of second degree murder (Pen. Code, § 187, subd. (a)).[1] The court found that defendant was the same person convicted of a prior strike (the identity finding), and the jury found true the allegation that defendant had suffered a prior strike. On appeal, defendant argues the following errors warrant reversal: 1) the jury committed prejudicial misconduct by discussing his failure to testify; 2) the court failed to give a sua sponte jury instruction on involuntary manslaughter; and 3) the court's identity finding was not supported by substantial evidence.[2] We find no error with respect to the last two issues, but find that an evidentiary hearing was reasonably necessary to resolve the extent of jury's misconduct in discussing defendant's decision not to testify. We therefore reverse and remand the matter to the trial court to determine

[1] All subsequent statutory references are to the Penal Code unless otherwise indicated.

[2] Defendant additionally argues that the court erred in giving a jury instruction on "flight," though he concedes the error was harmless. Defendant did not object to this instruction at his second trial, and his concession of harmless error disposes of this argument. (*People v. Clem* (1980) 104 Cal.App.3d 337, 344–345.)

in the first instance the nature and scope of the misconduct, as well as the existence and timing of any reminder of the court's instructions to disregard defendant's decision not to testify, and to reconsider the motion for new trial on this basis.

FACTS AND PROCEDURAL HISTORY[3]

The People charged defendant by information with murder (§ 187, subd. (a)), with a use of a deadly and dangerous weapon enhancement (§ 12022, subd. (b)(1)) and a prior strike conviction allegation (§§ 1170.12, subds. (a)–(d), 667, subds. (b)–(i)). Defendant's first trial resulted in a mistrial, and he was retried.

I. The Stabbing

A. *Linda Dunn*

On September 5, 2014, around 4:00 p.m., Linda Dunn[4] and her family were at the North Vallejo community center setting up for volleyball at the park. Linda noticed defendant and another man fist-fighting about 15 to 20 feet away. She also saw Albert Dunn, whom she knew growing up, lying under a tree 25–40 feet from the fight; he was not involved in the fight. Linda could not tell who the aggressor had been, and the fight lasted only a few minutes. After the fight, defendant ran across the street to the parking lot of a supermarket. At this time, about 10 to 15 people were gathering at the park. Linda did not see anyone chasing defendant, and the person defendant had fought stayed at the park.

Defendant returned to the park four or five minutes later. He was yelling, enraged, and ran through the park with his hand behind his back. The group that had gathered ran and said defendant had a gun. Defendant chased the group for about a minute and then approached Linda. He was like a "madman," in a rage and sweating. When Linda told him her family had nothing to do with the situation, he responded, "I don't give a fuck, B." Defendant had a knife.

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[3] We recite only the facts relevant to the issues on appeal.

[4] We refer to Linda Dunn by her first name to avoid confusion with the victim, Albert Dunn. The two are not related.

At that time, Dunn got up from the tree and walked down the grass towards the parking lot. Defendant turned and followed Dunn to the sidewalk where he repeatedly stabbed him. Dunn fell to the ground, and Linda believed that defendant stabbed Dunn from behind at least six times. She did not see defendant have any prior interaction with Dunn at the park.

When Dunn fell to the ground, a group of about 12 people, including the man defendant had fought, came back to the park. They were running with tree limbs and a shovel and chased defendant through the park and across the street. Linda's nephew, Deantra Bradford, was in the group chasing defendant in order to apprehend him.

Linda ran to Dunn, who was bleeding profusely. She had nursing experience and applied pressure to his wounds. She heard "wisping air" coming from the wound on his back and observed a bleeding wound on his chest. Dunn was non-responsive. Later that day, Linda identified defendant as the person whom she had seen stab Dunn.

B. *Deantra Bradford*

Deantra Bradford was at the park with family setting up to play volleyball. Bradford was about 20 feet from the fight that broke out between defendant and another man. The two fought for a minute or two; both were throwing punches. A third man was near the fight. The man whom defendant fought grabbed defendant's backpack, threw it down, and he and some other men rummaged through it. Bradford did not hear this man say, "give me your money out of your wallet," and he did not recall telling police that had occurred.

After the fight, defendant ran across the street towards a shopping center with a Mexican restaurant. About 15 to 20 minutes later, he returned to the park, crouching and hiding something behind his back. Bradford yelled that defendant might have a gun. The people near Bradford scattered, and the man defendant had been fighting ran away. Defendant was growling, in a rage, and sounded like an animal. He pulled out a knife. When defendant approached Bradford, Bradford told him he had his child with him. Defendant turned away and walked towards Dunn. He then stabbed Dunn at least ten

times in quick succession in the chest. Dunn did not move. Some people confronted defendant with tree branches, he ran, and they chased him.[5]

C. *Hector Chavez*

Hector Chavez owned a Mexican restaurant in the shopping center across from the park. On the day of the incident, Chavez was working in the back office and his employee, Leticia Perez, was working the cash register. Around 4:00 p.m., from a security camera feed inside his office, Chavez saw a man, later identified as defendant, ask Perez for the phone. Defendant used the phone for a couple of minutes and then left. Chavez left his office to investigate, and he saw defendant go towards the park across the street and then come back shortly thereafter followed by people. Chavez closed the restaurant doors because of the people following defendant, who threw things at defendant and hit the store windows. Defendant tried to open the door, but Chavez held it shut and locked it. Chavez saw defendant holding something, possibly a knife. An officer arrived a few minutes later and made the people following defendant back up. He handcuffed defendant and took him away. Store cameras captured the events inside and outside Chavez's store.

D. *Leticia Perez*

When defendant entered Chavez's restaurant and asked Perez to use the phone, his demeanor was normal but his nose was bleeding. He asked for the phone once in English and once in Spanish, and Perez thought he needed some help. Defendant tried to make a call, but no one answered, and Perez noticed he had tears in his eyes. He tried his call again, returned the phone to Perez, left, and headed toward the park. Perez saw the tip of a knife in defendant's hand as he left the store. Defendant returned a couple of minutes later with several people behind him. They appeared to want to hurt him, they threw things, and one person had a shovel. Defendant tried to open the store door, but Chavez had locked it. The police arrived shortly after.

[5] Letha Hines also testified by videotape that she saw men with tree limbs chase a man from the park across the street. Prior to the chase, she saw another man fall onto the sidewalk as the man who was later chased stood over him, shaking uncontrollably.

E. *Defendant's Arrest*

California Highway Patrol (CHP) officer Scott Deal was at a stop light near the park when he spotted a group of 10 or so people running from the park to the shopping center.[6] One individual waved Officer Deal down and said a man with a gun ran from the park into the shopping center. Officer Deal headed to the shopping center where he found a group of people standing in front of a store. One person yelled, "That's him. That's him," and the officer saw defendant standing in front of the doors of a restaurant. Officer Deal drew his gun and ordered defendant to put his hands up. Defendant complied. As Officer Deal placed defendant in handcuffs, someone from the group punched defendant in the face and another kicked him. Officer Deal commanded the crowd back and had defendant sit on the curb. He located a knife near where defendant had sat. After viewing the knife in court, Officer Deal confirmed the handle was about four inches long and the blade was about two and half inches long.

Someone from the group around defendant said there was a possible stabbing at the park. Officer Deal advised dispatch about a possible stabbing involving a child, and defendant said, "It was not a child, it was a grown man."

CHP Officer Frank Jorgensen assisted Officer Deal while defendant was handcuffed and seated on the curb. When the officers stood defendant up, there was a knife on the sidewalk about two to three feet from defendant. While Officer Deal searched defendant, Officer Jorgensen held defendant from behind and heard him rambling about what happened in the park. Defendant said they were calling him "a sorry little bitch" and he wasn't going to take it. Defendant also said, "I fucking stabbed him," and ended with, "I think I came out okay." Defendant talked on and off for a couple minutes, although the officers had not questioned him.

F. *Forensic and Medical Evidence*

Dr. John Wood performed surgery on Dunn. Dunn had stab wounds on the left side of his chest near his heart, in the back towards the scapula, and possibly under the

[6] Officer Deal's testimony from the first trial was read at the second trial.

armpit. His wounds were not superficial. Due to a large volume of blood loss, Dunn was taken to the operating room. His heart stopped beating during surgery, and he was pronounced dead at the age of 41.

Dr. Arnold Josselson, forensic pathologist, performed Dunn's autopsy. He observed several sharp-force external injuries consistent with those from a knife. One or two wounds appeared on Dunn's left upper back, and a fatal stab wound about an inch deep appeared mid-back and entered Dunn's left chest cavity. Dunn also had stab wounds on his upper arm and chest, and a small-cut on the back of his finger.

The blade of the knife that CHP officers recovered near defendant was 2.5 inches in length. Dunn's DNA was on the knife blade and in the blood stains on defendant's jeans.

II. The Jury Deliberations and Verdict

The court instructed the jury on first degree murder, second degree murder, and voluntary manslaughter based on the heat of passion and imperfect self-defense. Deliberations started, and the jury requested clarification on the definition of second degree murder the next day. It subsequently asked two additional questions on the mental state required for second degree murder. The jury found defendant guilty of second degree murder and found true the allegations as to the use of a deadly weapon and the prior strike.

DISCUSSION

I. Juror Misconduct

Defendant argues that the court erred when it denied his motion for a new trial and found there was no substantial likelihood of prejudice from the jury's discussion of his failure to testify. The People argue that the jurors expressed nonprejudicial "transitory comments of wonderment and curiosity" (*People v. Hord* (1993) 15 Cal.App.4th 711, 727), and the court correctly denied defendant's motion for a new trial. As the People acknowledged, this court has the power to remand this matter for an evidentiary hearing if the record regarding juror misconduct has not been sufficiently developed. Because we

find that the record here is not sufficiently developed, we remand this matter for an evidentiary hearing on juror misconduct.

A. *Additional Background*

Prior to deliberations, the court instructed the jury that "the defendant has an absolute constitutional right not to testify. He may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. [¶] Now, do not consider for any reason at all the fact that [defendant] did not testify in this case. Do not discuss that fact during your deliberations or let it influence you in any way."

Arguing that the jury violated this instruction, defendant moved for a new trial with three supporting juror declarations. Juror No. 9 declared, "The alternate juror who was later seated to deliberate said during deliberations she would have felt better if Mr. Jackson had testified. There was then a discussion about Mr. Jackson not testifying amongst some of the female jurors. It was also mentioned and discussed by some jurors that they needed more evidence or testimony from Mr. Jackson that would show that he was protecting himself and that his possessions were all he had." Juror No. 3 declared, "There was discussion during deliberations that the jury wanted to hear Mr. Jackson testify. There was a discussion among the jurors that they wanted to hear from Mr. Jackson talk about self-defense and whether he was homeless, and whether the backpack was everything he owned, and also his own character. Later, the alternate juror who was seated also mentioned that she would like to have heard Mr. Jackson testify." Finally, juror No. 5 declared, "The alternate juror who was later seated to deliberate said she would have liked to have heard Mr. Jackson testify in his own defense. Then a discussion followed on this topic amongst some of the female jurors." The People did not submit counter-declarations, though they noted in their briefing that the court had the power to hold an evidentiary hearing on juror misconduct.

At the hearing on the new trial motion, defendant's counsel acknowledged that the court could hold an evidentiary hearing on juror misconduct, but counsel believed that a hearing was unnecessary because the People did not introduce evidence to rebut the

presumption of prejudice. Counsel nonetheless conceded that defendant would submit to an evidentiary hearing if the court required additional information. Stating that the "record here is pretty straight forward," the court declined to hold an evidentiary hearing.

While ruling on the new trial motion, however, the court stated that it had concerns regarding jurors' comments about defendant not testifying and observed that the record was "a little vague, because there's reference to him not testifying and there's reference to the defense not offering evidence." The court appeared to conclude that the record was "a little blurry" with respect to the jurors' discussing the defendant not testifying versus them discussing the state of the evidence on defendant's self-defense theory. The court then denied the motion, finding, "It seemed to me that the conduct as described didn't, in looking at the overall nature of things, again, there's nothing in the record to show that because these statements were made, again, [Evidence Code section] 1150 gets complicated here, but there's nothing in the record that shows that such a thought permeated the rest of the jury, and/or resulted in that juror not following instructions. Meaning a statement is made, I can't tell from the record anything that suggests that the jury didn't otherwise go on to follow all of the instructions. So, I'm not going to find that the alleged misconduct of the references to the defendant not testifying require or warrant reversal."

1. Analysis

"The Fifth Amendment to the federal Constitution provides that no person 'shall be compelled in any criminal case to be a witness against himself.' . . . Thus, the Fifth Amendment entitles a criminal defendant, upon request, to an instruction that will 'minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify.' " (*People v. Leonard* (2007) 40 Cal.4th 1370, 1424–1425 (*Leonard*).) The purpose of this rule is to prevent the jury from drawing adverse inferences against the defendant in violation of the constitutional right not to incriminate oneself. (*Id.* at p. 1425.) " 'When the record shows there was juror misconduct, the defendant is afforded the benefit of a rebuttable presumption of prejudice.' " (*People v. Solorio* (2017) 17 Cal.App.5th 398, 407 (*Solorio*).) " 'This presumption is provided as an

evidentiary aid to the defendant because of the statutory bar [Evidence Code section 1150, subd. (a)] against evidence of a juror's subjective thought processes and the reliability of external circumstances to show underlying bias.' " (*Ibid*.)[7]

The presumption of prejudice arising from juror misconduct may be rebutted with an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm resulting from the misconduct. (*People v. Lavender* (2014) 60 Cal.4th 679, 687 (*Lavender*).) Courts consider three factors to discern whether a reasonable probability of actual harm resulted from juror misconduct: whether jurors drew adverse inferences of guilt from the defendant's decision not to testify, the length of the discussion on the topic, and whether jurors were reminded not to consider the defendant's decision not to testify. (*Solorio, supra*, 17 Cal.App.5th at pp. 409–410 [describing these as the *Lavender* "rebuttal factors"].)

When a trial court is aware of possible juror misconduct, the court should make whatever inquiry is reasonably necessary to resolve the matter. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1255.) Thus, it is well within the discretion of a trial court to conduct an evidentiary hearing to determine the truth or falsity of allegations of jury misconduct. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 419.) The hearing should not be used as a " 'fishing expedition' " to search for possible misconduct but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. (*Ibid.*)

Here, the parties do not dispute that the jurors' discussion of defendant's decision not to testify constitutes jury misconduct, so the question for our independent review would normally be whether the People have rebutted the presumption of prejudice arising therefrom. (*Lavender*, *supra*, 60 Cal.4th at p. 687.) However, as the court observed

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[7] Evidence that shows the effect of a statement, conduct, condition, or event upon a juror is not admissible to impeach a jury verdict. (Evid. Code, § 1150, subd. (a); *People v. Elkins* (1981) 123 Cal.App.3d 632, 638 ["The subjective quality of one juror's reasoning is not purged by the fact that another juror heard and remembers the verbalization of that reasoning"].)

below, the record is not clear as to the scope of the alleged misconduct and whether the discussion of defendant's decision not testify indicates that the jurors drew adverse inferences therefrom or, alternatively, reflected their assessment of the state of the evidence as to the charged crimes and defenses. Further, the record is silent regarding whether the jury foreman admonished the jurors and the duration of the discussions regarding defendant's failure to testify. In these circumstances, further inquiry was reasonably necessary to resolve factual questions regarding the extent of the jury misconduct, and it is appropriate for the court on remand to explore the *Lavender* rebuttal factors to assess the potential prejudice arising from the misconduct. (See *Lavender, supra*, 60 Cal.4th at pp. 692–693.)

B. *Instructional Error*

Defendant argues that the court failed to give a sua sponte instruction on involuntary manslaughter as a lesser included offense. He claims that the evidence supported an involuntary manslaughter instruction based on misdemeanor manslaughter (§ 417, subd. (a)(2) [misdemeanor brandishing]) and a homicide committed without malice during a felony assault (§ 245).

Both voluntary and involuntary manslaughter are lesser included offenses of murder. (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30 (*Brothers*).) The court has a duty to instruct sua sponte on a lesser included offense when substantial evidence could allow a reasonable juror to conclude that the lesser included offense, but not the greater, was committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) In other words, the court must instruct on a lesser included offense " 'when the evidence raises a question whether all the elements of the charged offense were present, but not when there is no evidence the offense was less than that charged." " (*People v. Moye* (2009) 47 Cal.4th 537, 548.) " '[T]he existence of "any evidence, no matter how weak" will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury.' " (*Id.* at p. 553.) We review the court's failure to

instruct on a lesser included offense de novo, considering the evidence in the light most favorable to the defendant. (*Brothers*, at p. 30.)

"Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) "[M]alice may be express or implied. [¶] . . . It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) It is implied when the defendant engages in conduct dangerous to human life, " ' "knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life." ' " (*Brothers*, *supra*, 236 Cal.App.4th at p. 30.) Involuntary manslaughter, by contrast, "is the unlawful killing of a human being without malice." (§ 192.) Involuntary manslaughter includes a killing occurring during the commission of "an unlawful act, not amounting to a felony" (*ibid.*), and an unintentional killing in the course of a noninherently dangerous felony committed without due caution or circumspection. (*Brothers*, at p. 31.) After *People v. Bryant* (2013) 56 Cal.4th 959, wherein the Supreme Court held that a killing committed without malice during the commission of an inherently dangerous felony could not be voluntary manslaughter, involuntary manslaughter has also been held to encompass such a killing. (*Brothers*, at pp. 33–34.)

Accordingly, an instruction on involuntary manslaughter as a lesser included offense must be given when a rational jury could entertain a reasonable doubt that an unlawful killing was accomplished with malice during the course of an inherently dangerous assaultive felony. (*Brothers*, *supra*, 236 Cal.App.4th at p. 34.) Similarly, in the scenario of misdemeanor brandishing of a knife, a defendant is guilty of involuntary manslaughter only if the defendant acts without malice and the stabbing was accidental. (*People v. Thomas* (2012) 53 Cal.4th 771, 815.)

This record does not reasonably suggest that defendant accidentally stabbed Dunn or acted without malice. Defendant returned to the park after the fight visibly enraged, carrying a knife. He chased a group of people gathered in the park and then turned towards Dunn. When he saw Dunn get up from under a tree and start walking towards the street, defendant followed him and stabbed him with a knife multiple times from

behind in the mid to upper back, chest, and upper arm—parts of the body where stabbing would do great harm. Defendant "indisputably has deliberately engaged in a type of aggravated assault the natural consequences of which are dangerous to human life, thus satisfying the objective component of implied malice as a matter of law." (*Brothers, supra,* 236 Cal.App.4th at p. 35 [aggravated assault with a broom]; *People v. Cook* (2006) 39 Cal.4th 566, 596–597 [defendant was not entitled to an involuntary manslaughter instruction after he brutally beat his victim with a board].)

Nor is there a material issue as to whether defendant subjectively appreciated the danger his conduct posed to human life. Defendant seeks to create such an issue with evidence that he was enraged when he stabbed Dunn and argument that the knife wounds were shallow. While defendant's rage could suggest voluntary manslaughter, it does not reasonably suggest that defendant lacked a subjective understanding of the danger of his conduct. With respect to the stab wounds, medical testimony characterized them as deep, not superficial, and the approximately one-inch killing stab to Dunn's mid-back was sufficiently deep and forceful to penetrate his chest cavity. No reasonable juror could conclude that defendant's repeated infliction of serious stab wounds to the mid to upper back, arm, and chest showed that he lacked a subjective awareness of the danger his conduct posed to human life. Further, defendant made a number of statements after his arrest indicating that he was aware of his actions and their consequences, including his identification of his victim as a grown man and his statements that, "I fucking stabbed him," and "I think I came out okay."

In sum, the evidence did not raise a material issue as to whether defendant killed Dunn without malice such that the court had a sua sponte duty to instruct on involuntary manslaughter. (*Brothers, supra,* 236 Cal.App.4th at p. 35.)

C. *The Identity Finding*

Defendant's final assertion of error is that the record does not contain sufficient evidence to show that he is the same Michael Jackson convicted of first degree burglary in 1996. "[T]he question of whether the defendant is the person who has suffered [a] prior conviction shall be tried by the court without a jury," and the defendant's identity

must be proven beyond a reasonable doubt. (§ 1025, subd. (c); see *People v. Monge* (1997) 16 Cal.4th 826, 833–834.) We review the record in the light most favorable to the court's finding to determine whether there is substantial evidence to support the conclusion that defendant was the person who suffered the prior conviction. (*People v. Saez* (2015) 237 Cal.App.4th 1177, 1190 (*Saez*).)

Here, evidence of the same name and the same birth date provides substantial evidence in support of the court's identity finding. (*Saez, supra*, 237 Cal.App.4th at p. 1190 [same name and birth date]; *People v. Towers* (2007) 150 Cal.App.4th 1273, 1286 [same birth date and similar tattoo and name].)

Defendant contends that the court could not consider the shared birth date because the court did not take judicial notice of the Information. Defendant is incorrect. The People requested that the court take "notice" of the name and birth date on the 1996 abstract of judgment and the Information, and the court indicated it would do so. Under established standards of appellate review, we presume the People's request for "notice" was a request for judicial notice. (See *People v. Sullivan* (2007) 151 Cal.App.4th 524, 549 [we presume a judgment or order of the lower court is correct].) The minute order from defendant's arraignment in this case also lists a birth date and name matching those on the 1996 abstract of judgment. Further, although defendant argued that the People had to offer photographic evidence or fingerprints to prove identity, he did not object to the court's taking "notice" of the same birth date on the Information and the 1996 abstract of judgment. Substantial evidence thus supports the court's identity finding.

DISPOSITION

Because the trial court's error concerns only a failure to conduct further proceedings relating to juror misconduct, we conditionally vacate the judgment and remand to the trial court with directions to conduct an evidentiary hearing on the subject of juror misconduct, to be held in compliance with Evidence Code section 1150. If, after the evidentiary hearing, the new trial motion is not granted, the trial court shall reinstate the judgment.

Nothing in this decision is intended to be, nor should be, construed as an expression of any opinion on whether prejudicial juror misconduct occurred in this case or whether a motion for new trial should be granted.

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BROWN, J.

WE CONCUR:

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POLLAK, P. J.

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STREETER, J.